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1 UNITED STATES DISTRICT COURTS
2 SOUTHERN DISTRICT OF NEW YORK

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3 SAUL HOROWITZ, *as Sellers'*
4 *Representative,*

Plaintiff,

5 v.

17 CV 7742 (JPO)

6 NATIONAL GAS & ELECTRIC, LLC,
7 *et al.,*

8 Defendants.

9 -----x

10 New York, N.Y.
11 January 28, 2020
12 11:15 a.m.

Before:

13 HON. J. PAUL OETKEN,

District Judge

14 APPEARANCES

15 KING & SPALDING LLP
16 Attorneys for Plaintiff
17 BY: ISRAEL DAHAN
CHELSEA J. COREY

18 RICHARD T. MAROONEY, JR

19 MORGAN LEWIS & BOCKIUS LLP
20 Attorneys for Defendants
21 BY: TROY S. BROWN
22 DANA E. BECKER
MICHELLE PECTOR
23 JARED WILKERSON
24 SU JIN KIM
25

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2 (Case called)

3 THE COURT: Good morning, everyone.

4 This is the scheduled final pretrial conference in
5 advance of the bench trial in this case.

6 While I am on the subject, as you can tell this
7 courtroom is acoustically challenged as you have noticed
8 before. So it is very hard for all the court reporters to
9 record proceedings in this courthouse because they are not well
10 suited to good acoustics. It is very important that we all
11 speak into the microphones when we speak. When I do bench
12 trials, I have the person who is examining the witness speak
13 from behind the podium, rather than walking around. One of the
14 reasons that is important is to make sure you are speaking into
15 the microphone so that the court reporter can take everything
16 down. So bear that in mind.

17 I saw the parties a couple months ago and we talked
18 about where things stand. In the interim I received a lot of
19 paper. I knew I was going to get the direct testimony by
20 declaration or affidavit. I didn't know it was going to be a
21 thousand pages of witness statements, but that is what I got.
22 I guess I asked for it.

23 I have also received the parties' pretrial memoranda
24 and some motions in limine. I haven't had a chance, because
25 we're still several weeks out from the trial, to absorb

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1 everything and do all the research. So I am not likely to be
2 ruling across the board on issues, including motions in limine.
3 Although, I may have some questions to help tee things up.

4 I do want to go through a few housekeeping matters
5 which I do in advance of any bench trial. We have talked about
6 opening statements. Since I have read through the pretrial
7 briefs, at least on an initial quick read, I don't know that we
8 need openings. I know what the issues are I think. So I would
9 be fine dispensing with them, unless you all want to do them.

10 Do you have feelings about that?

11 MR. DAHAN: I could see an advantage to it. It will
12 be a month from now before we get in front of your Honor.
13 There will be a lot of witnesses. So it may put some short
14 overview of what we present at trial especially since we're
15 also doing written directs.

16 THE COURT: So you could want to do it?

17 MR. DAHAN: Obviously we'll defer to the Court.
18 Again, if we stick with the 20, 25 minutes that we discussed, I
19 would propose maybe just a keep that in mind if that works for
20 the Court.

21 THE COURT: Mr. Brown, do you want to do them?

22 MR. BROWN: We're fine with that, your Honor.

23 THE COURT: We'll say at about 25 minutes for
24 openings. In a civil case, openings will be plaintiff first
25 and then defendants. Closing will be defendants and then

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1 plaintiff.

2 The next thing I wanted to talk about is the number of
3 witnesses and see if there is any disputes about that.

4 How many witnesses do you have? I know they are
5 listed in the joint pretrial order, but I forget the number.

6 MR. DAHAN: We have eight written directs. We have
7 four people that we have identified as hostile witnesses who
8 have written directs. They have been submitted for defendants
9 that we would call in our chief in case. There are three other
10 individuals who we have not submitted directs, who are not in
11 our control that are still employees of the defendants. One is
12 in California and one is just a recent former employee of
13 defendants. None of them our under our control so we have not
14 submitted written directs for them. We intend to call them
15 live. So in total that would be 18. Eight plus four plus
16 three -- sorry -- 15.

17 THE COURT: So the four are adverse witnesses. I
18 don't like the word "hostile." It is just a loaded term.

19 MR. DAHAN: That's fine.

20 THE COURT: So the four adverse witnesses are
21 witnesses that are in the defendants' case so there is written
22 direct?

23 MR. DAHAN: Yes. We would just cross-examine them on
24 those things.

25 THE COURT: Then the other three, there is no written

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1 direct but you want to call them?

2 MR. DAHAN: Correct.

3 THE COURT: Do you object to that?

4 MR. BROWN: We did assert objections at least to two
5 of them in particular. Two of the individuals, who are not
6 identified by plaintiffs in their Rule 26 disclosures, were
7 never identified as witnesses, they never relied on, they
8 didn't seek discovery from them, and all of a sudden we got
9 notice that we wanted to call them adversely in their case. We
10 have noted objections in the pretrial order.

11 THE COURT: To two of them?

12 MR. BROWN: To two of them.

13 THE COURT: Who are they?

14 MR. BROWN: Bruce Shipper, which is listed as No. 15
15 on page 30 of the pretrial order in plaintiff's lists and No.
16 14 Amir Benisti.

17 THE COURT: What is your argument, Mr. Dahan?

18 MR. DAHAN: One of them was identified in our
19 interrogatory responses as a person with relevant information.
20 That was Bruce Shipper. Another one is through discovery. The
21 two individuals, your Honor, are people who ran the commercial
22 broker desk at Major Energy during the relevant period and were
23 in fact even still employed -- one of them at least until
24 December of this past year. And another one is still employed
25 there. The commercial business is obviously a very relevant

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1 issue. Whether we would call them as our rebuttal witnesses as
2 to some of the contentions they are making, but we believe they
3 are relevant witnesses. It should not be a surprise to
4 defendants. In fact, they just made a production yesterday of
5 additional documents involving these individuals which will be
6 a separate issue I will discuss with your Honor shortly. So we
7 don't understand the prejudice sitting this far out of them
8 fielding this issue or these witnesses are in any way a
9 surprise.

10 THE COURT: Do you plan to call them as rebuttal
11 witnesses?

12 MR. DAHAN: No. We plan to call them in our
13 case-in-chief. I am saying I don't understand what the point
14 there would be because anyhow that issue is whether we then
15 call them as a rebuttal witness to statements that their
16 clients would make. We believe they are direct witnesses. The
17 commercial business is a relevant issue to this case as your
18 Honor has read in the papers. These are the two people who ran
19 the commercial desk.

20 THE COURT: Are there two or three?

21 MR. DAHAN: So that's the two that they are talking
22 about. The third that we're not objecting to is a former is
23 PSE employee, the Pacific Summit, the prior supplier, who is in
24 California, James Chung. I guess they are saying they are not
25 objecting to that. He was identified in our disclosures.

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1 MR. BROWN: Your Honor, I guess a couple points.
2 First, to the extent that these witnesses were just identified
3 as potential trial witnesses, we produced documents as a
4 supplementation just now because this is the first we've heard
5 they are coming to testify at trial. They were not custodians
6 who hit for search terms that the parties agreed to. Now that
7 we see they are being called to testify about information
8 before knowing if your Honor would allow it, we produced and
9 ran their names through certain custodial files and produced
10 additional documents that we may use to examine them at trial
11 if your Honor permits it. We didn't object to Mr. Chung
12 because he is a third-party witness from Pacific Summit and he
13 was identified.

14 Frankly, your Honor, the two individuals, Benisti and
15 Shipper, are cumulative of information your Honor has already
16 seen in I think the 450 plus pages of submissions from
17 plaintiff witnesses talking about the commercial piece of this
18 case; but obviously we need to protect the record. We think
19 this is overkill.

20 MR. DAHAN: Your Honor, those are the two individuals
21 who will have the direct interactions with the broker. So to
22 extent there would have been objections at trial of our
23 witnesses as to hearsay, these are the witnesses who dealt
24 directly -- directly -- with the brokers. They ran the broker
25 desk. So it would be therefore no potential issues for hearsay

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1 and they have direct knowledge and relevance. We don't believe
2 they will be long witnesses. Our examinations will not be long
3 with them. We'll not make it cumulative. If your Honor feels
4 it is cumulative in a bench trial, I am sure you can cut us
5 off. We do believe that they are very direct and relevant to
6 this case.

7 THE COURT: I am not going to preclude them
8 categorically, but I am thinking about doing a time limit. It
9 is sort of a chess clock situation where each side gets
10 whatever the breakdown would be to result in about a five-day
11 bench trial and give each side equal time. I have done this
12 once or twice before.

13 Here is what the rules will be: When counsel for
14 plaintiff is standing up questioning a witness, that time would
15 be counted against the plaintiff. When defense counsel is
16 standing up questioning a witness, that would be counted
17 against defendant. Objections sort of work out in the wash
18 unless I find someone is unreasonably objecting and wasting
19 time in which I decide to count it against them. Similarly
20 with side bars. There will not be real side bars, but they
21 will be open court side bars. Generally if there is an
22 argument about an issue, I will divide it equally between the
23 two like an admissibility issue or some other legal issue. If
24 I decide that one side is unreasonably delaying things, I will
25 count it against that side.

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1 We assumed five hours of testimony a day. Five times
2 five is 25. Let's say 26. I would give each side 13 total
3 hours.

4 What do you think?

5 MR. DAHAN: Can I be heard on that, your Honor?

6 THE COURT: Sure.

7 MR. DAHAN: So obviously it is your Honor's court and
8 your Honor will run how he sees fit. We have added the
9 witnesses. So your Honor asked about witness numbers. There
10 are 11 directs. That means we have to do cross-examination on
11 11 witnesses. We'll have to do redirects on the eight
12 witnesses we've submitted. Assuming we have those three
13 witnesses we added, those are three live directs and redirects.
14 They have also named four additional individuals who they
15 intend to call live who were not submitted as written directs
16 by other parties in their case. Therefore, we will have to do
17 cross-examination on those witness. In total that is 26
18 witnesses we will have to address -- we, plaintiffs alone -- in
19 this case either through crosses, directs, redirects.

20 THE COURT: Well, the point of having a time limit is
21 to make it fewer than that.

22 MR. BROWN: That is on average a half hour a witness.
23 Your Honor, some of these witnesses are a lot longer. There
24 were over 2,000 exhibits submitted in this case. All we were
25 saying is even if we average an hour witness, which is not long

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1 given some witnesses in this case, our case alone would be 25
2 hours.

3 THE COURT: So you think this will be a month-long
4 trial?

5 MR. DAHAN: No. We weren't predicting five-hour days
6 either.

7 THE COURT: Wait. You are predicting how long for the
8 days?

9 MR. DAHAN: Again, I don't know your Honor's schedule;
10 but if it was 9:00 to 5:00 or if your Honor wanted to stay
11 longer, I don't know.

12 THE COURT: I go 9:30 to 5:00. There is an hour for
13 lunch and a 15-minute break in the morning and afternoon.
14 There is evidentiary issues. So I think the time ended up
15 being closer to five hours a day.

16 MR. DAHAN: We had envisioned a couple extra days of
17 trial. Also Friday, your Honor, so your Honor is aware, myself
18 as well as the plaintiff himself as well as several clients are
19 Orthodox Jews. And given the month we're in now, 3:00 is the
20 latest we could stay. That itself is a shortened day. There
21 will be openings on Monday. Again, we'll do what we have to
22 do, but we're not looking for a month. We are looking to
23 suggest it may bleed into the second week a day or two. That
24 is all we're suggesting.

25 THE COURT: I am open to going more than a week. I am

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1 trying to prevent it from being two or three weeks.

2 MR. DAHAN: That's fine, your Honor. We were
3 envisioning -- again, if every witness in this case testifies,
4 it adds up just on our case alone because we have to address
5 their witnesses, too, to 26 witnesses.

6 THE COURT: That's not cumulative, that number of
7 witnesses?

8 MR. DAHAN: Again, they submitted 11 directs. I don't
9 know if they will go forward with them. If they do, we have to
10 examine 11 witnesses. We have presented eight. I assume they
11 want to cross-examine eight witnesses. They have four
12 additional witnesses. We don't know who they will call live.
13 The numbers are the numbers. I am not trying to give the Court
14 a hard time in any way.

15 THE COURT: I understand.

16 MR. DAHAN: We did the math last night and even if we
17 average a hour -- again, some will be shorter and some will be
18 longer. We have experts, documents, complicated formulas that
19 are complex here. 25 hours just on our case alone and I
20 presume they will want the same for their case. That is 50
21 hours. I guess if it is only five hours a day, then 50 hours
22 would be two full weeks. All we're suggesting is we believe,
23 especially with Friday being a shorter day, it is likely going
24 to bleed into a second week if it works into the Court's
25 schedule. Our client doesn't want to pay us for a month's

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1 trial. That is for sure. So we're not looking to do that
2 anyway.

3 THE COURT: Mr. Brown, do you want to address the
4 issue of witnesses, slash, timing?

5 MR. BROWN: Yes, your Honor.

6 THE COURT: You have 11 written directs?

7 MR. BROWN: Yes. Some of which are fairly short and
8 address narrow issues, your Honor, which would likely yield
9 short cross-examination. Four of the live witnesses who we
10 would call potentially by trial subpoena are three of
11 Mr. Dahan's clients -- the silent or minority investor
12 shareholders and Mr. Stud Mickey, the former deal lawyer who
13 did the deal who has been deposed in this case, all of whom I
14 believe are in this jurisdiction. So, yes, there are a lot of
15 witnesses.

16 What I will say, your Honor, not that each case is not
17 different and rises on its own, but two weeks ago I had a
18 one-week trial in the International Trade Commission and there
19 were a similar number of witnesses, an incredibly complex and
20 highly technical expert-driven trade secrets case where we did
21 live directs, live crosses, and also had to set aside time for
22 the United States staff to question, along with the judge. We
23 did it on a clock on a similar schedule. It was about six
24 hours and 20 minutes a day based on similar time breaks that
25 your Honor has identified without written directs. We got

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1 through. The way that both sides got through a complex case
2 was instead of the one-hour cross, we did 20 minutes crosses
3 and focused in on the issues that were really pertinent and not
4 nonpertinent issues. The cases finished up in five full days

5 Now, there was no closing at the end. One the things
6 we raised in the pretrial order was the potential to maximize
7 -- particularly now that Mr. Dahan has noted the early
8 departure Friday needs, which I was not aware specifically,
9 though, I did know that Mr. Dahan and others are observant, we
10 could schedule a closing argument, slash, oral argument as your
11 Honor indicated at the last status conference from the bench
12 some time after the posttrial submissions. So we're still of
13 the view that five days should be more than sufficient. And
14 the point of putting us on a clock to make sure that if you
15 only need a 20-minute cross, you don't do a 40-minute cross.
16 If you do, you have to take away time from other witnesses.
17 We're all sophisticated and we can certainly get through it in
18 five days.

19 THE COURT: So you have 11 written directs and four
20 other witnesses?

21 MR. BROWN: Four witnesses that we have identified to
22 call, three of whom are controlled by plaintiffs and one of
23 whom is their former lawyer, who they presented at deposition
24 who we would call all on narrow issues. We also have the
25 benefit generally, your Honor, with the exception of counsel

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1 discussing any out-of-order needs based on timing, because this
2 is a bench trial and because we have written directs, we have a
3 fairly straightforward presentation of the witnesses.
4 Plaintiffs will be presenting their witnesses. We'll be
5 crossing them and there will be narrow redirects I assume and
6 vice versa, including the adverse witnesses which they will
7 cross-examine off of their written directs in our case. In my
8 view, your Honor, this can be a fairly efficient five-day
9 trial. Counsel is always held to clocks when they need to be
10 held to clocks.

11 MR. DAHAN: Your Honor, I have done enough trials on
12 the clock. I have done them the other way, too. Again, I am
13 being realistic. We're the plaintiff with the burden. There
14 are a lot of issues here. Obviously subject to whatever your
15 Honor might decide at pretrial and assuming everything goes
16 forward at this point, there is a lot to cover. Again, we're
17 not even suggesting that it would be the full two weeks, but I
18 don't think it is unreasonable to assume that you may need a
19 couple extra days than essentially the four and a half days for
20 trial.

21 THE COURT: I will take that under advisement and
22 think about it. I am open to the idea of having closings
23 later. Especially if they are posttrial briefs. It might make
24 sense to have closing following the filing those. So we'll
25 think about that.

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1 I will think about the clock. I am sensitive to the
2 fact that there are a lot of witnesses. There are factual
3 issues and legal issues that are informed by background facts.
4 So I don't want to impose a time limit that is unreasonable.
5 In any event, I will not set that this minute. I will let you
6 in advance if I do. I might just not actually impose a clock
7 but just be an activist judge in the sense of moving you along
8 when I feel like things are getting cumulative.

9 As I said, counsel will question from the podium.

10 One issue that I wanted to flag is technology for the
11 courtroom. I don't know if you all have used the technology in
12 these courtrooms. If you talk to Mr. Hampton, my courtroom
13 deputy, you can arrange a time to come in if you haven't yet
14 and figure out how to plug into our system basically. We don't
15 have a jury here so it is even less complicated.

16 With respect to documents, exhibits and witness
17 testimony, you can show the witness their written direct and
18 have them adopt it. Or if you want we can dispense with that
19 and agree that that is technically done since it is under oath
20 and just start with the cross. You can show the witness
21 exhibit and you can move for its admission and we'll just keep
22 track of what is admitted.

23 So if you want to arrange to come in some time and
24 check out our system and how you get documents on the system,
25 that will be great.

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1 MR. DAHAN: We actually have our vendor here and I
2 think they have spoken before, your Honor.

3 THE COURT: Great. Feel free to arrange a time to do
4 that before the trial.

5 The other thing is I used to have the parties bring in
6 a whole bunch of exhibit binders and you will probably need
7 exhibit binders to show witnesses things and to show counsel,
8 etc. I would be fine with dispensing with paper exhibits. If
9 you are able to put all the exhibits and potential exhibits on
10 thumb drives -- what is better thumb drives or disc?

11 THE DEPUTY CLERK: Thumb drives.

12 THE COURT: If you can put them on thumb drives at
13 least maybe a week before the trial, Mr. Hampton can get our IT
14 people to put it on our system. So that when you call up an
15 exhibit, I can put it up on my computer and then we don't have
16 a bunch of paper flying around. That will save the trees. So
17 if you can do that, that will be great.

18 As long as you are doing that, you might as well take
19 all the written directs and also have a thumb drive that has
20 all the written directs on it so we can put it in a place that
21 I can easily find. Later when I am working on findings and
22 conclusions, I can have it accessible without having a bunch of
23 binders.

24 So as I said, I read through but only fairly cursorily
25 the pretrial memoranda and the motions in limine briefing. I

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1 don't think I am going to be issuing rulings in the nature of
2 summary judgment before the trial. I think I am going to let
3 all the evidence come in. But having read the legal arguments
4 in the briefing, I think there are some broader legal issues.
5 One of the most important of which I think we've talked about
6 and is prominent in the briefing is the relationship between
7 the MIPA master agreement and specifically its non-assignment
8 provision and the earn-out agreement with its non-assignment
9 provision except for affiliates. I think I may spend a little
10 bit of time looking at New York law at how you apply the canons
11 of contract interpretations in that situation. If I come up
12 with an answer, even a provisional answer, I will let you know
13 before or during the bench trial.

14 I think there are a few legal issues like that that
15 you have ably briefed in our pretrial memoranda. I have
16 started thinking about them. It is possible that I won't rule
17 on any of that until the end partly because the legal answer
18 may depend in part on the relationship of the contracts and the
19 timing of the contracts, the intent parties, etc., which is
20 information I will be getting a sense of from the witnesses'
21 testimony. So that's just to say don't expect summary judgment
22 rulings in advance of the trial. Most likely I will be
23 bringing everything in and doing one set of findings and
24 conclusions, which will include the legal rulings that you've
25 essentially asked for.

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1 On that question since I have been puzzling it over
2 this morning, were the MIPA and earn-out agreement executed at
3 the same time together?

4 MR. DAHAN: No. The MIPA was first signed. The
5 earn-out agreement was thereafter signed. Again, your Honor
6 has read our position. We believe that they have two different
7 functions and they have two different provisions and each one
8 says what they say as this agreement can be assigned or this
9 agreement can be assigned in their own way and they can be
10 treated independently.

11 THE COURT: So the MIPA says you cannot assign this
12 agreement and probably was assigned and it seemed to be
13 assigned; but the earn-out agreement has the calculation for
14 the earn-out and the targets and everything. That says, let's
15 assume, you can assign that to an affiliate. Why wouldn't the
16 remedy for assigning of the MIPA be the same as the measure
17 that would resolve from assigning the earn-out agreement?
18 Because the earn-out is exactly the thing that has the
19 calculation that is the delta that plaintiff is claiming is the
20 damages here. In other words, why is it a no harm, no foul
21 assignment of the MIPA?

22 MR. DAHAN: Right. So our position on that, your
23 Honor, is that again the MIPA had its own separate issues.
24 First of all, the earn-out agreement doesn't discuss the cash
25 installment payment issue. That is not in the earn-out

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1 agreement. That is only in the MIPA. That is first.

2 Second of all, the MIPA controls an ownership. Now,
3 our position is that you can have ownership of a company and
4 you can have an obligation of an earn-out agreement. The fact
5 that you want to give away the assignment of the earn-out
6 agreement and who will have to pay that earn-out portion and
7 not the cash installment portion is irrespective of whether or
8 not who will be the owner of this company, who owns the
9 membership interests. Our position is again we're not
10 suggesting they didn't have the right. If they want to
11 corporate-wise assign who will have to pay out the earn-out
12 portion, the \$20 million portion, if they want to figure out
13 how they want to do that, they can go do that without our
14 consent.

15 What they cannot do without our consent is change what
16 we agreed to as who will be the owner, right. I think it is
17 important, your Honor, to also focus on 6.3 of their agreement
18 where they make the representation, right, that we are buying
19 this for our asset, for our own investment purposes with no
20 intent to sell or offer it for sale, right, in Section 6.3 of
21 the MIPA, which we identified before we discuss 11.7. So now
22 it is on top of that you cannot assign this without our
23 consent, which they obviously knew that because that is why
24 they went into their Spark MIPA and had to put a provisional to
25 get consent and an omnibus agreement draft said we have to get

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1 the consent from the plaintiffs. They understood that that is
2 what they needed to do that.

3 They didn't have to do a drop-down and a sale of the
4 ownership to an earn-out. You want to assign the earn-out, who
5 owns it, go do that. We're not stopping you from that; but you
6 don't have the right to do this. And if you want, you can but
7 just get our consent. We're not saying it is unlawful; just
8 get our consent. You need our consent. You didn't get our
9 consent so you cannot now do that and you definitely cannot do
10 as we outlined in our papers all the shenanigans that they did
11 to get around that that we only learned after the fact.

12 THE COURT: Okay.

13 MR. DAHAN: So that's the difference. So we're not
14 suggesting -- it is two different agreements. We are not
15 saying they breached the earn-out agreement. They didn't
16 breach the earn-out that we. Obviously we think they breached
17 it under 2.7. They didn't breach the assignment clause in that
18 provision, but that doesn't mean we can't say that you breached
19 this assignment clause.

20 THE COURT: Do you want to respond briefly, Mr. Brown?

21 MR. BROWN: Yes, your Honor. Thank you. A couple
22 points.

23 First, I don't think Mr. Dahan was technically
24 incorrect when he answered that the MIPA was signed first, but
25 the MIPA and the earn-out agreement were signed on the same

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1 day. The earn-out agreement is incorporated by reference into
2 the MIPA so they are transactional documents signed in
3 connection with the same transaction on the same day.

4 The real dispute, as your Honor identified in this
5 case, is not about cash installment payments, which are not
6 contained there and are contained elsewhere; but there is not a
7 real dispute over cash installment payments. The dispute in
8 this case is twofold. One, were there breaches of the control
9 of the business provision after closing, which is all set forth
10 in the earn-out agreement such that it damaged sellers' ability
11 to make their earn-outs at a maximum amount; and alternatively
12 were there calculation errors in the earn-out based on how each
13 year's earn-out should be calculated. Those, as your Honor
14 observed, the drivers of damages, the drivers of the dispute
15 over the earn-out comes from the earn-out agreement, which was
16 freely assignable.

17 Your Honor has seen the factual dispute between the
18 parties about what sellers knew and didn't know, what they
19 ratified, waived or estopped or didn't. Those are in the
20 pretrial memos and both sides have argued them. What is
21 relatively important in our view and has been briefed is the
22 fact that the payments made to the sellers were paid under the
23 earn-out agreement. They were paid and they were retained and
24 they secured the benefit of the disputed earn-out payments all
25 paid after the earn-out agreement was assigned.

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1 THE COURT: This is your waiver, estoppel,
2 ratification set of arguments; right?

3 MR. BROWN: Well, it is a combination. That is one
4 piece of the argument with respect to how it impacts whether or
5 not there is a breach or an impact from a breach of 11.7 of the
6 MIPA; but it is particularly critical on the causation and
7 damages front, which is what I think your Honor's question was
8 introducing originally, which is what is the causal connection
9 between an alleged drop-down in violation of 11.7 of the MIPA
10 and the damages sought by sellers here for failure to properly
11 calculate an earn-out or to deprive them of the ability to make
12 a maximum earn-out because of alleged operational control
13 issues that defendants obviously vigorously dispute. So it is
14 both a causation damages issue from an elemental standpoint and
15 also if necessary and the Court needs to reach it the
16 ratification, estoppel, waiver issues.

17 THE COURT: That is helpful general background. What
18 I haven't done yet is what I would like to do when I deal with
19 these interesting puzzle contract issues, which is basically my
20 staring at the agreements and trying to get a sense of how they
21 are interpreted. As I suggested at the conference earlier this
22 year, I think there is a limited value to each side's
23 unexpressed subjective interpretation of a lawyer said
24 something or somebody else said something but not to the other
25 side. That is limited value in a situation where I can apply

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1 contract principles. I think I need to spend some time before
2 the bench trial staring at the contracts and figuring out the
3 right way to interpret particularly that provision but other
4 provisions as well.

5 MR. DAHAN: If I could add, your Honor?

6 THE COURT: Sure.

7 MR. DAHAN: Another point, as we make in our papers,
8 is again if you look at -- I am sure your Honor will look at
9 the cases on rescissory damages, which nobody thinks is an
10 appropriate form of relief -- now, whether we're entitled to
11 that relief or not, but it is not like it is a made-up form of
12 relieve employed in assignment contracts. Specifically, again
13 in a contract construction when you have a contract that is
14 automatically voided, it is not the plaintiff that is
15 penalized. In other words, it is not -- the fact that there
16 may be a separate contract that we have other rights against,
17 don't mean we don't have rights against this contract. And
18 this contract gave us rights. One of them was to be able to
19 have a company owned by NGE during the earn-out period.

20 THE COURT: Right. The rescissory damages ultimately
21 is what would life be in the counterfactual world where the
22 drop-down hadn't been done.

23 MR. DAHAN: But you look then to your Honor's point.
24 2.7 says, I want to look at how the next two and a half years
25 look. Rescissory damage is no different than typical

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1 rescission is. You don't look into the future. You look then.
2 What is the value now versus what the value ultimately was, it
3 turned out. So that is how we get harmed.

4 When a company does a merger and it is now being
5 rescinded they all say, *Well, how do you know you would have*
6 *been a successful merger?* The answer is look at the case law.
7 It says the damage measure is at that point in time. What our
8 expert did say was, *What was the fair market value of the*
9 *earn-out at that time?* We don't say it was 35 million. He
10 says it was 18.8. We did get 9 million. You can't double
11 recover. So the difference is on the rescissory damages -- if
12 your Honor says our only damage in this case is rescissory
13 damages, we would not get 26 million. We would only get 9.8
14 million. That is the point

15 So it is two separate forms of relief. For 11.7 what
16 we're seeking and why we're seeking only 9.8 is because at that
17 point in time on a fair market value when that breach occurred
18 and we got infringed on our bargained for right, right, the
19 value according to our expert -- they can disputed that is a
20 proper analysis. It wasn't worth 18.8. What was the value --
21 but on that value that is what it was. Deduct what we got,
22 that is your damage at that point.

23 THE COURT: I understand.

24 MR. DAHAN: I think it is important for your Honor to
25 keep that in mind.

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1 THE COURT: Right. Since I was thinking about that
2 issue, I just asked about it.

3 MR. BROWN: I assume your Honor there is no need for
4 me to surreply on the rescissory damages, which we briefed
5 comprehensively and our expert has addressed.

6 THE COURT: Yes, you have.

7 That brings us to motions in limine. Plaintiff has
8 moved to preclude the testimony of Gary Lancaster and certain
9 evidence and argument in light of an alleged privilege waiver.
10 Again, I just looked at that briefly. I am not prepared to
11 rule right now. You guys briefed it I believe adequately.
12 Defendants have Mr. Lancaster. He is one of your witnesses on
13 direct; is that correct?

14 MR. BROWN: Correct. Submitted a full direct
15 examination.

16 THE COURT: Right. You are alleging that privilege
17 has not been waived and you are still asserting your privilege,
18 but there is certain factual testimony that Mr. Lancaster can
19 still give. Is that your position?

20 MR. BROWN: Slightly different, your Honor. Certainly
21 the testimony he has offered in his written direct is not
22 privileged and therefore we're not voluntarily waiving
23 privilege and putting certain matters at issue.

24 Secondly, to the extent that there was any argument of
25 sword and shield, which we don't think there is validly,

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1 plaintiffs elected not to depose Mr. Lancaster. They didn't
2 question him. They didn't establish a record of what was or
3 wasn't privileged. In fact, they never raised and never
4 brought to your Honor's attention or engaged in any motion
5 practice alleging that we were somehow using privilege as a
6 sword and shield.

7 What I believe they think is the witness statement is
8 the sword and it is factual, and their witnesses have raised
9 issue in their witness submissions about things that Mr.
10 Lancaster did or didn't say, told them or didn't tell them,
11 believed or didn't believe based on intent. In fact, some of
12 the trial exhibits have Mr. Horowitz and Mr. Peterman, *Go ask*
13 *Gary Lancaster. He negotiated on behalf of the defendants. He*
14 *knows what everybody intended.* So we have a dispute in the
15 record that both parties will be able to cross-examine
16 witnesses on with respect to that

17 Finally, your Honor, just to make the record, we
18 addressed pretty comprehensively in the opposition to the
19 motion in limine the serial identified portions of witness
20 statements and deposition testimony that plaintiffs identified
21 in their motion suggesting that they created the sword after
22 which the shield was enacted and we serially identified why
23 none of them hold water in the reply brief. They were not
24 serially addressed in rebuttal. That is because it is not a
25 sword and it is not a shield, and Mr. Lancaster will be

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1 cross-examined adequately by Mr. Dahan or one of his colleagues
2 on factual issues.

3 THE COURT: Lancaster, what was his title? What was
4 his position?

5 MR. BROWN: He was in-house counsel to NGE who was the
6 kind of the lead deal lawyer like Mr. Studnicky. He was the
7 lead deal lawyer for plaintiffs in connectin with the and MIPA
8 and the earn-out and the other ancillary documents.

9 THE COURT: Studnicky was outside counsel; right?

10 MR. BROWN: Yes. NGE did not have outside counsel
11 working on the deal. Mr. Lancaster was working on the deal
12 from a deal-lawyer perspective. Mr. Studnicky was outside
13 counsel as his deal counterpart.

14 THE COURT: One of the questions in the back of my
15 mind is who are the lawyers on this deal. It was neither of
16 your firms?

17 MR. BROWN: It was not our firm. I don't believe it
18 was or firm.

19 MR. DAHAN: No.

20 THE COURT: That's good for your firms.

21 Do you want to respond briefly to what Mr. Brown just
22 said?

23 MR. DAHAN: I will let Mr. Marooney respond.

24 MR. MAROONEY: Your Honor, briefly.

25 It is important to focus on the witness statement

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1 obviously of Mr. Lancaster. If you look at Mr. Lancaster's
2 witness statement, who as we say and is the in-house lawyer and
3 the lawyer on the deal, he is offering his own opinions as to
4 what the contractual provisions at issue here mean. He says in
5 paragraph 71, "NGE always intended to use only the last nine
6 months". . . and I will stop there and so and so forth. He
7 says if you look at paragraphs 95 through 103 in describing --
8 remember, there is an April 11th, 2017, memorandum, your Honor,
9 that has been well briefed and talked about. In that memo Mr.
10 Lancaster lays out what we believe to be not entirely accurate
11 but closer to the number that is owed to us for 2016 and that
12 was sent to us and the payment was wired.

13 In his witness statement, Mr. Lancaster tries now to
14 put that in context. He says, *Well, that was only for*
15 *compromise and settlement. That was just done in good faith.*
16 *We were trying to reach a resolution.* He is opining on what
17 that is. What you see on their privilege log simultaneously is
18 emails around that time in communications between Mr. Lancaster
19 on the one hand and business folks on the other hand where he
20 is giving his advice about this very subject.

21 So our only point is when we see here is a lawyer as a
22 witness here giving testimony as to what these contractual
23 provisions mean and what was intended, it is only fair to us to
24 have the underlying advice that he was giving at the same time
25 and that is what we mean by sword and shield. We're by no

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1 means trying to preclude them from putting on their case and
2 all the other histrionics I read in the opposition brief. It
3 is just a matter of basic fairness.

4 If you also look at Mr. Kroeker's witness statement,
5 Mr. Kroeker when you look at paragraphs 75 to 79 he'll say, *I*
6 *believe what I believed about what the contract said and what*
7 *the earn-out percentage was based upon what Mr. Lancaster told*
8 *me and other things.* They hedge a bit. He flatout says, *I*
9 *believed what I believed based upon what Mr. Lancaster told me,*
10 *both about the earn-out payments and the consent issue,* which
11 your Honor just raised before. So if they are going to have
12 witnesses, including the general counsel and including their
13 own executives giving testimony about their understandings and
14 contractual provisions that are at issue, then we're entitled
15 to the documents they withheld on their own privilege log.
16 That is our basis.

17 THE COURT: Right. I understand the positions. We
18 don't need to go back and forth on this. You have briefed it
19 fully and ably. I don't think this is something where I am
20 going to take the time to go through the witness statement and
21 sort of parse out what I think is excluded and what isn't. The
22 answer is going to be that the motion is granted in part. And
23 to the extent that something could be interpreted as a legal
24 conclusion, it is not going to be admissible. To the extent it
25 can be interpreted as not based on the witness's personal

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1 knowledge as witnesses, I am going to disregard it. But I am
2 not going to go through it and parse it.

3 MR. DAHAN: Your Honor, so I know for trial an example
4 our concern is so we know for our preparation of cross, I took
5 the deposition of Mr. Kroeker. When I would ask him, What did
6 you discuss with Mr. Lancaster, as we highlight in our papers,
7 we would get an objection that it was privileged. Will I now
8 be able -- our concern is will I now -- now that they put him
9 in this case -- right, we didn't know they were going to submit
10 his written direct, right. So now we are raising it that now
11 we see he is a witness, Mr. Lancaster, and so now it becomes an
12 issue to us. Our question is: Are we going to be permitted to
13 now at least -- I mean, even if we are not getting the
14 documents in advance of trial that they withheld, but will we
15 be allowed to examine the witness now on the very conversations
16 that they were having among -- with Mr. Lancaster and Mr.
17 Lancaster with him about the very topics that he is saying I
18 relied on Mr. Lancaster and Mr. Lancaster is now offering his
19 opinion?

20 THE COURT: I am not admitting the opinion as an
21 opinion so there is no need to.

22 MR. DAHAN: I meant not his opinion. For example:
23 Mr. Kroeker, what did you discuss with Mr. Lancaster that told
24 you this. At depositions I was objected to and he was not
25 permitted to answer that question.

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1 THE COURT: Mr. Brown.

2 MR. BROWN: If I can briefly, your Honor.

3 What I understand you are saying both sides have
4 submitted a wealth of direct statements that have the
5 respective parties' views on the intent of the agreement and
6 the intent of the parties. Plaintiffs witness statements say,
7 Here is what we all intended; and defendants witness statements
8 say in part, Here is what we intended. Your Honor is going to
9 decide when parol evidence is admissible and when parol
10 evidence is not admissible. When your Honor decides I presume
11 at trial that these contracts are unambiguous and we need no
12 parol evidence from either side, you will sustaining objections
13 in realtime addressing those issues. It sounds like you will
14 be doing the same thing with respect to Mr. Horowitz,
15 Mr. Wiederman, Mr. Studnick, Mr. Lancaster, and Mr. Kroeker
16 with respect to whether or not something does or doesn't invoke
17 an opinion or a privileged issue.

18 Again, your Honor, these issues have been in this case
19 since fact discovery. Mr. Lancaster wasn't deposed at
20 plaintiff's election and nobody on plaintiff's side ever raised
21 in motion practice issues alleging that Mr. Kroeker at
22 deposition said X, said Y, or was precluded by privilege
23 assertions from saying Z, which was the appropriate time long
24 before trial to raise any concerns they had about the
25 inappropriate nature of any alleged instructions and whether or

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1 not that did or did not invoke intent evidence.

2 THE COURT: Mr. Dahan said you instructed him not to
3 answer certain things.

4 MR. BROWN: As we briefed pretty comprehensively there
5 were certain times where there were instructions given about
6 particular questions about privilege. Mr. Dahan is blending
7 certain general instructions from a lengthy deposition with
8 some overarching theme that he was precluded from answering any
9 questions about any issue and that we briefed pretty
10 comprehensively. Again, we laid it out issue by issue, cite by
11 cite that they put in their motion and explained exactly what
12 was going on and we believe have identified and debunked that
13 entire theory. You cannot talk about this with high contextual
14 executive bullet points. We went through serially and
15 identified each one in the opposition brief.

16 THE COURT: Mr. Dahan.

17 MR. DAHAN: Again, your Honor, when I am sitting at a
18 deposition and someone instructs the witness not to answer
19 communications with their lawyers, I don't really have an
20 objection at that point. There is a privilege. What all of a
21 sudden makes that now improper -- at that time there would be
22 no motion I could file. If Mr. Kroeker doesn't want to reveal
23 the communications he had with the lawyers, I understand that.
24 Now that the lawyer is being put into the case and the lawyer
25 is being a witness in this case and now Mr. Kroeker is going to

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1 be saying what he relied on based on my communications with
2 that lawyer who is now a witness in this cases, yeah, now I do
3 have a concern that wait now things are a little different.

4 Now the playing field is different. The playing field
5 wasn't that way at the deposition. I probably would have lost
6 that motion at that point. Our issue is that now that we find
7 out that Mr. Lancaster is in fact a witness, is in fact going
8 to be providing testimony on these issues, Mr. Kroeker is going
9 be relying on conversations he had with Mr. Lancaster, I would
10 like to ask him, So now tell me about those conversations.

11 THE COURT: What is your point?

12 MR. DAHAN: To his point that I would ask my question
13 of whether or not we will be entitled at trial to makes those
14 and as to his point that I should have made an objection back
15 at the deposition when they asserted privilege before I even
16 knew that Mr. Lancaster was going to submit a witness statement
17 at trial. It was not a ripe issue for us to argue sword and
18 shield back then.

19 THE COURT: Understood. I haven't read it closely
20 enough to rule on this, but I will before the trial. I am
21 going to be deciding these in realtime.

22 MR. DAHAN: Yes.

23 THE COURT: Similarly, number two, plaintiff moves to
24 prelude evidence and argument about unrelated disputes. I am
25 not sure there is a dispute here. There are these

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1 indemnifications and escrow and other disputes which are not
2 directly at issue.

3 Mr. Brown, what is your position as to why they become
4 part of the trial?

5 MR. BROWN: We've comprehensively briefed that as
6 well, your Honor. They fall into several buckets. So with
7 respect to indemnification claims and the indemnification
8 lawsuit and issues relating to that, they are relative to at
9 least to two topics. One, there is an issue about what was
10 driving a business's success or lack thereof leading into the
11 closing and for the 33 months post-closing and issues
12 pertaining to regulatory challenges within certain
13 jurisdictions, including lawsuits asserted by states against
14 the Major Energy business before, during and after the earn-out
15 period is relevant to what was happening within that 33-month
16 period concerning why the business performed or did not
17 perform.

18 THE COURT: So, yes, that's relevant unless I accept
19 Mr. Dahan's view of rescissory damages being a snapshot at the
20 moment of drop-down.

21 MR. BROWN: Well, the interesting part about
22 rescissory damages as a snapshot, and that is both addressed in
23 our pretrial memorandum but also in our motion in limine to
24 exclude certain of Mr. Leathers' new opinions and otherwise.
25 The rescissory damage snapshot in time would be a snapshot in

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1 time at time of the drop-down that then has to adjust for the
2 fact that plaintiffs actually received millions and millions of
3 dollars in earn-out payments. So it is not supplemental to
4 that. It is at the time if there was a rescissory damage in
5 the but for world and we would have gone back and not have this
6 entire event occur, then their damages experts argues it is 8.8
7 or 9.8 -- I don't have it open in front of me -- and they
8 received \$9 million in actually earn-out payments thereafter.
9 So it is essentially a wash. We've addressed that issue.

10 With respect to some of the other activities, it goes
11 both to unclean hands defense, which we have raised. There is
12 a tort claim in this action. We briefed it comprehensively in
13 opposition to the motion in limine. Frankly, your Honor, with
14 respect to one of the issues we were talking about on the
15 pretrial memorandum and whether or not there was a material
16 breach in connection with the 11.7 of the MIPA through the
17 dropdown, while it is not binding on your Honor, one of the
18 things we have in this record is when your Honor sent us all to
19 arbitration in Texas to deal with the money that plaintiff took
20 out of the escrow early when it should have been in escrow, the
21 arbitrator actually considered that issue and found in a
22 bilateral action between the parties who are parties to this
23 case that there was no material breach in connection with the
24 drop-down. No material breach of 11.7 in connection with the
25 MIPA.

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1 THE COURT: Did the arbitrator issue an opinion?

2 MR. BROWN: He did.

3 THE COURT: It is confidential? Can I see it? Did
4 anyone submit it? Is it a trial exhibit?

5 MS. PECTOR: Yes, your Honor.

6 MR. DAHAN: Your Honor can feel free to read it and
7 see that it does not say that. If it does, your Honor will
8 take it for what it was.

9 THE COURT: That will be a trial exhibit?

10 MR. BROWN: That is a trial exhibit, your Honor, yes.

11 THE COURT: And you stipulated to that?

12 MR. DAHAN: Well, no, we object. We don't think the
13 arbitration is a relevant issue. So we object to the issue as
14 an exhibit that is not relevant. Your Honor can decide that
15 when he sees it. That breach, again, first of all happened in
16 2019 after the earn-out period. So I am not sure how that
17 breach would undermine in any way a breach that occurs on
18 August 23rd, 2016, under 11.7 or any breach that occurs in the
19 earn-out period.

20 Your Honor, I think the arbitrator made very clear
21 that he was not making findings with respect to the MIPA and
22 only focusing on the earn-out. What he did say -- I am sorry,
23 escrow. What he did say was that the -- we argued that he
24 should not find a breach of the escrow because there was a
25 prior breach of the drop-down. It was an argument we made

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1 that, you know, therefor it was a prior breach in August and so
2 if we breached the escrow now, a breach in party doesn't get to
3 claim breach for the first breach. What he found was again
4 making clear he is not making any findings under the MIPA
5 because he is only there to deal with the escrow, but he didn't
6 believe that that breach was material to the escrow agreement
7 and the issue of whether or not the escrow agreement should
8 stay. So we tried to combine the drop-down into the escrow and
9 he is like, well, I don't find that; but that has nothing to do
10 with whether the drop-down and the MIPA, which is central to
11 this case, would be a material breach of the MIPA itself.

12 THE COURT: I understand. This is the kind of thing
13 if it were a jury trial, I would be spending a lot of time on
14 this stuff; but because it is a bench trial, I will be making a
15 lot of these judgments essentially during the trial. Sorry
16 that I am not able to give you answers on all this today.
17 Again, the answer can be to what I decide is extraneous doesn't
18 come in and if I hear it I will put it in the part of my brain
19 and disregard it. In the days before the bench trial starts, I
20 will be doing a thorough review of all this stuff. So I think
21 at the beginning of the trial, I will have something but
22 probably before that.

23 Then the defendants' motion is to preclude certain
24 opinions of plaintiff's expert David Leathers. Again, I
25 haven't had a chance to dig into that. That is trickier than

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1 the others and I haven't focused on it.

2 Mr. Leathers' report, is it attached to something?

3 MR. DAHAN: It is attached to their motion and it is
4 also a trial exhibit.

5 THE COURT: Anything else?

6 MR. DAHAN: Yes, your Honor. I want to understand
7 your Honor's preference for trial. Given the number of
8 witnesses and the number of witness statements, as your Honor
9 is deciding how many days trial will be and the order, will it
10 be beneficial to your Honor to know at some point before trial
11 which witnesses will be coming up likely that day so that if
12 your Honor knows which witness -- I presume your Honor doesn't
13 want to have to keep in his mind 20 witness statements.

14 THE COURT: Exactly. That's a great point. I should
15 have raised that. I would like to know which witness
16 statements I have to read the night before. I don't know that
17 I will read all 1,000 pages the weekend before. So, yes, I
18 would like to know in advance what is on tap if possible.

19 MR. DAHAN: Okay. Another issue would be to ask for
20 your Honor's consideration. One of the things that were
21 discussed at the last conference was order of witnesses and the
22 concern for witnesses potentially being called twice.
23 Therefore, let's say, for example, if there was a Spark
24 employee witness that defendants would call in their case and
25 we would also identify as a witness in our case, therefore

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1 maybe that witness will be called right when defendants start
2 their case to avoid that witness being called twice.

3 Now that we're dealing with anyhow -- well, let's just
4 use a hypothetical. We have identified Mr. Kroeker as a
5 witness that we want to -- that we think is important to our
6 case and our burden. We're going to be having to go through
7 all our witnesses as well. We might feel that it is important
8 for us to have Mr. Kroeker's testimony earlier on in the case,
9 especially if the Court is concerned about duplication or
10 certain things in foundation things we might want to set up in
11 our burden for tortious interference claims or other claims in
12 this case, given that anyhow when it is defendant's turn they
13 wouldn't really do anything with Mr. Kroeker other than put him
14 on the stand and say, *Okay, Mr. Dahan, do your*
15 *cross-examination*, we would ask that we should have the ability
16 to therefore call from the four witnesses we've identified of
17 the defendants that we are calling in our case-in-chief to take
18 them earlier than before we first go through all our eight
19 witnesses that we have submitted and the three additional
20 witnesses and then all of a sudden call Mr. Kroeker in the
21 case. We're not sure what the prejudice will be because again
22 defendants when it is their turn, they can do whatever redirect
23 or whatever they would do with Mr. Kroeker when they would call
24 him over and turn him over to me to cross-examine.

25 THE COURT: Are you saying for Mr. Kroeker when you

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1 call him as witness number two, you want him to put in his
2 witness statement in?

3 MR. DAHAN: Yeah. I presume that's -- we'll be
4 cross-examining him on his witness statement anyhow. Again, he
5 is our witness.

6 THE COURT: That makes sense to me.

7 Do you have a problem with that?

8 MR. BROWN: Well, no, not necessarily. I believe when
9 we had our a last status conference, my understanding from a
10 witness travel and planning standpoint was for witnesses who
11 are submitting written statements, plaintiff would be calling
12 theirs in their case-in-chief and we would be calling ours in
13 our case-in-chief and the cross-examinations would go in that
14 order. This is unlikely to be, and I suspect highly unlikely
15 to be, a directed verdict case at the close of plaintiff's
16 case-in-chief. So we don't have the typical concern that if
17 they don't get Mr. Kroeker or somebody else in their
18 case-in-chief, they risk not establishing some element or some
19 key facts that they are exposed to a directed verdict.

20 So from a planning standpoint considering most of my
21 witnesses are in Texas, I was under the assumption and have
22 told my witnesses plaintiff has X number of witnesses and we
23 will be crossing them and then our witnesses will be presented
24 and then we'll finished. That is at least my plan. Mr. Dahan
25 is now suggesting maybe he will call some of witnesses to cross

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1 in their case-in-chief so to speak which creates traveling
2 ordering issues that we haven't planned for and frankly I think
3 is really unnecessary in a bench trial.

4 THE COURT: I don't care about the order. I know you
5 are looking for a strategic advantage. I will hear all
6 witnesses that will come in. Look, I think you should call
7 witnesses whenever. The order is not going to matter. I guess
8 you have the right to call a witness.

9 MR. DAHAN: Right.

10 THE COURT: You can ask Mr. Brown to try to make
11 someone available.

12 MR. DAHAN: Okay.

13 THE COURT: Look, if it is not doable, they will have
14 to come later. Try to work it out.

15 MR. DAHAN: Understood.

16 THE COURT: Just try to be reasonable.

17 MR. BROWN: On the first point, your Honor, certainly
18 pre-disclosure of the witness expected for the next day makes
19 sense. Typically I would have a preference to exchange that by
20 6:30 the night after -- so 6:30 Sunday night, Monday night,
21 Tuesday night -- so that we at least in the early stages who
22 we're preparing to cross and who we are not.

23 THE COURT: Is that okay?

24 MR. DAHAN: Definitely. I would hope that maybe we
25 would come to an agreement for the first day of trial before

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1 Monday night. We'll give adequate notice in advance.

2 MR. BROWN: Can I raise another housekeeping? This is
3 a true housekeeping. Because many of us are out of state and I
4 am the only with a service pass, we do have an electronic
5 devices order, your Honor, for each of our five lawyers taking
6 a role in the case that would allow a cell phone and a lap top.
7 I have it if I can approach and hand the order up if that is
8 acceptable.

9 THE COURT: Sure. Give that to Mr. Hampton.

10 MR. DAHAN: Your Honor, will we be able to submit a
11 similar one?

12 THE COURT: Yes.

13 MR. DAHAN: Thank you.

14 THE COURT: Mr. Hampton will take care of that.
15 Anything else?

16 MR. DAHAN: Again, your Honor, I mentioned this early.
17 I am not here obviously reserving my objections to the fact
18 that we received 200 pages of documents last night two weeks
19 after the joint pretrial order, but what we would ask is at
20 some point this has to stop with continually going into
21 producing additional documents as they do more searches that we
22 have no idea what these searches are. We are trying to get
23 ready for trial.

24 THE COURT: Oh, you don't want anymore documents?

25 MR. DAHAN: I think the Court probably doesn't want

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1 anymore documents either.

2 MR. BROWN: Your Honor, in fairness we didn't know
3 that Mr. Shipper and Mr. Benisti, who they didn't identify in
4 their Rule 26s were going to be witnesses in this case. They
5 didn't hit for search terms that the parties agreed to. So
6 once I found out they are calling them for their case, we went
7 through and found documents that we might need for
8 cross-examination and produced them promptly.

9 THE COURT: Understood. Do you expect anymore?

10 MR. BROWN: Unless they identify new witnesses late I
11 don't anticipate anymore, your Honor.

12 MR. DAHAN: We do not.

13 MR. BROWN: One other issue, your Honor. We didn't
14 raise the sequestration of fact witnesses. We have an
15 individual plaintiff and two corporate defendants. Other than
16 a rep for each of the individual corporate defendants and
17 obviously Mr. Horowitz, who is the plaintiff himself, we would
18 ask for sequestration of all the witnesses in the case with the
19 exception of the experts for the length of the case.

20 THE COURT: Are you okay with that?

21 MR. DAHAN: If he can just identify for me on your end
22 who you are referring to?

23 MR. BROWN: So every fact witness would be sequestered
24 except for the two experts. I assume Mr. Horowitz is your rep
25 and will be here in the courtroom. I presume he is testifying

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1 first anyway so it is probably not an issue. And then we would
2 have a corporate rep from NG and Spark who I will identify for
3 you in advance.

4 MR. DAHAN: Sure.

5 THE COURT: Fair enough.

6 Thank you everyone. Have a good day.

7 o0o